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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 270

THE HENRIETTA MILLS, COMPLAINANT-APPELLANT,

versus

RUTHERFORD COUNTY, IN THE STATE OF NORTH CAROLINA, AND W. C. HARDIN, SHERIFF, APPELLEES.

REPLY BRIEF OF COMPLAINANT-APPELLANT

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The complainant-appellant in this case elected to stand on its brief filed in support of its petition for writ of certiorari, the defendants-appellees having filed no brief in opposition thereto. The defendants-appellees having now filed a brief, the complainant-appellant files this reply brief. The appellant without restating its argument and the authorities in support thereof respectfully refers the Court to the brief heretofore filed in support of its petition for writ of certiorari.

In this reply brief appellant desires to call the Court's attention to inaccuracies apparently inadvertently made by the defendants-appellees in their brief filed in this cause, and to some features of the case referred to by defendants-appellees in their brief.

NO FINDINGS OF FACT BY EITHER DISTRICT OR CIRCUIT COURTS

The defendants-appellees contend in their brief that there were findings of fact made by the District and Circuit Courts which defendants say preclude the complainant-appellant from having relief in this action. The Court's attention is respectfully directed to the opinions of both the District and the Circuit Courts. By a reading of that part of the District Court's opinion shown in the record (p. 133) it is apparent that the District Court did not undertake to make any findings of fact because the Court expressed himself in the following language:

> "But in my view of this case it is not necessary to go into the merits of the matter, because I am compelled to hold that the complainant has no standing in this Court."

The Court immediately thereafter set forth his opinion that the complainant had an adequate remedy at law in the Courts of the State of North Carolina. *In this connection the District Court held that the complainant had pursued the methods marked out by State laws up to the point of testing its rights in the State Courts and said that the complainant could have gone into the State Courts and asked for a restraining order to stop the collection by the Sheriff of the tax alleged to be unlawfully levied.*

With respect to any finding of fact by the Circuit Court, the opinion of that Court is entirely clear that its opinion was based upon the theory that the complainant-appellant had an adequate remedy at law in either the State or Federal Courts and was precluded from going into a Court of Equity in the Federal Court by reason of Section 267 of the Judicial Code to the effect that:

"Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

The complainant-appellant having heretofore, in its brief filed in support of its petition, set forth clearly the reasons why it had a right to go into a Federal Court of equity and having set up in that brief the proper construction of Section 267 of the Judicial Code, as discussed and explained fully by Mr. Chief Justice Taft in *Grether vs. Wright,* 75 Fed. 742, demonstrated clearly that the Circuit Court of Appeals made its decision on the basis of decision of the Supreme Court in *Pusey & Jones vs. Hansen,* 261 U. S. 491, the decision in which case is not applicable to the case at bar.

The defendants-appellees contend in their brief that this Court has no right to reverse the Circuit Court of Appeals because of findings of fact by the District Court and the Circuit Court. Under the practice in North Carolina this position is not tenable, because it has been expressly and repeatedly held that findings of fact by the Trial Judge are not binding on our appellate Court in injunction cases, but that the Court will itself look at the evidence presented before the Trial Court and determine whether or not plaintiff was entitled to the relief sought.

Saunders vs. Insurance Co., 183 N. C. 66.
Leaksville vs. Spray, 183 N. C. 511.

INJUNCTIVE RELIEF AGAINST UNLAWFUL ASSESSMENT RECOGNIZED IN NORTH CAROLINA

The appellees, on page 14 of their brief, cite *Mace vs. Commissioners,* 99 N. C. 65, and several other cases in support of their contention that injunctive relief should not be granted. A reading of those cases, however, discloses that the facts in each of them were far different from the facts in the case

at bar and in some cases based upon different statutes and dealing with a different class of taxation. Without citing further authorities herein the Court's attention is directed to page 14 et seq. of Appellant's brief filed in support of its petition for certiorari. Therein will be found cited the latest cases setting forth the holding of the Supreme Court of North Carolina to the effect that injunctive relief may be had against unlawful assessments and recognizing the principle that payment of tax under protest with right to sue to recover is not an adequate remedy at law against invasion of a tax payer's right by an illegal and unlawful assessment. The recent cases cited are so clear that it is unnecessary to hark back to old cases to find the authority in North Carolina on this point. Appendix B to the defendants'-appellees' brief in Sec. 464, Chap. 80, P. L. 1927, the biennial revenue act, and relates to income, franchise, license, and taxes other than property taxes, as are in dispute in this suit, and limits its provisions to taxes *"imposed in this act,"* and does not cover property taxes.

Furthermore, the Supreme Court of North Carolina has held repeatedly that when a complainant has made out a prima facie case for injunctive relief, or if the evidence leaves in doubt the question as to whether or not the complainant is entitled to such relief, a temporary injunction should be granted.

Marshall vs. Commissioners, 89 N. C. 103.
Harrison vs. Bray, 92 N. C. 489.
Faison vs. Hardy, 114 N. C. 58.

This rule is particularly to be enforced where the main relief to be finally sought is an injunction.

NO FAILURE OF COMPLAINANT TO APPEAR BEFORE COUNTY BOARD

The appellees attempt to bring up for consideration the fact that there was no appearance by the complainant before the County Board of Equalization when it met. Complainant considers it entirely unnecessary to discuss this point in detail because the District Judge in his opinion (R. p. 133) held that the complainant pursued the methods marked out by the State laws up to the point of going into Court. The reason that the complainant was not present at the alleged meeting of the Board of Equalization was because, as it contended, no such meeting was held on the dates provided for by law and whenever any meeting was held adjournment was had before the time expired for hearing complaints. Furthermore, under the law of North Carolina complainant filed its petition also before the State Board of Assessment, sometimes called the State Tax Commission, and that Board considered the matter, as it had a right to do, if complaint was filed "within ninety days after the final values are fixed and determined by the boards of commissioners of the county," and such complaint was filed in this case. (P. L. 1927, Art. II, Sec. 5, Sub-sec. 3. *Appendix A.*)

The complainant filed its complaint with the County Board on July 18, 1927 (R. p. 5) and filed another complaint on July 29, 1927 (R. p. 9), both of which were within the period of twenty days from the date that the County Commissioners held their alleged meeting. *Appendix A* contains that part of the statute authorizing complaint to be made to the State Board of Assessment and *Appendix B* contains that part of the statute allowing complaint to be filed with the County Board within twenty days after the equalization order is made.

It is in the record (p. 80) that one member of the Board of Assessors notified one of complainant's officers that the Board would meet with complainant's representatives on July 27,

1927, but on that morning when complainant was ready to present its complaint to the Board, the Board refused to hear it, whereupon appeal was taken to the State Board of Assessment. In this connection it might be pointed out that as late as August 25, 1927 no record had been made of any meeting held on July 11, as later was claimed to have been held by the County Board, although the records of the County Board at that time had been written up through meetings of August 3 (R. pp. 92 and 93). The meeting (record of which is set forth on pp. 34 to 38 of the Record) was apparently held at an irregular time and place and the minutes of which were written up after complainant's investigation on August 25, 1927.

ALLEGATIONS AND PROOF OF OVER-VALUATION

As to proof of over-valuation the defendants-appellees quote in their brief a portion of the District Court's opinion as to his failure to find that the taxing authorities of the defendant County had violated either the Fifth or Fourteenth Amendments to the Constitution of the United States. In the same opinion, however, the District Court also says: (R. p. 132.)

> "It will be noted in the complainant's bill that there is no allegation that the assessed value of its real estate is too high or in excess of its value, but it is higher in proportion to other real estate valued in the County."

This statement of the District Court is made directly in the face of the allegations in paragraphs five, (R. p. 3) twelve, (R. p. 9) and fourteen (R. p. 10) to the effect that the value of complainant's property was fixed in excess of its actual, true, fair, market, real and/or cash value on May 1, 1927. Paragraphs five and twelve set forth the allegation in figures and paragraph fourteen specifically alleges over-valuation.

It is quite evident from this that the District Court, doubtless on account of its great press of business, inadvertently made that statement without referring to the paragraphs in the complaint just referred to. The complainant's contention is that the District Court was of the opinion that there was an adequate remedy at law and did not attempt to go into the merits of the case or to make any findings one way or another, and the Court's statement as to the taxing authorities of the County not having violated either the fifth or fourteenth Amendment was based upon the Court's idea that the complainant had an adequate remedy at law.

As to proof of over-valuation, the Record, beginning with page 39 and running through page 91, is replete with conclusive testimony on that point. This evidence, most of which was by disinterested parties, shows clearly that the value of the Company's property, including personalty, was not in excess of $1,887,352 on May 1, 1927, the tax-listing date. The item of personal property valued at $513,584 is not in dispute, except insofar as complainant contends that it should be required to pay tax only on sixty per cent of that valuation, as will more fully hereinafter appear. The difference in dispute is the difference between a total valuation, after being partially reduced by the State Board, of $2,362,819 and the Company's contention of valuation of $1,887,352. This difference is the same as the difference between the Company's valuation of the real estate of $1,373,768 and the valuation of real estate by the State Board of $1,849,235. These figures, while not particularly pertinent in considering this appeal, are set up in statement form as APPENDIX C, to this brief.

The testimony of Thomas Nelson, who has been an appraiser for the State of North Carolina and other taxing units in the State, placed the valuation of the real estate at $1,347,154 against the Company's valuation of $1,373,768, thus showing that the Company was appraising its own property and setting up its value on its books considerably in excess

of the figure at which the appraiser (frequently used by the State and Counties) had valued the property. It must be borne in mind that these valuations were made by an examination of the property with an inventory before the appraisers, all of whom said that the property of complainant which was over-valued was in a rundown and out of repair condition and that the average age of the machinery was twenty years. On the other hand, the appraisals made by the defendants' witnesses, *all of whom were offcials of the County,* were made without a careful examination and inventory of the property. Fifty pages of record testimony speak in convincing manner to the effect that the complainant's property was grossly over-valued.

PROOF OF SIXTY PER CENT VALUATION GENERALLY

When we reach the question of discrimination between the assessment of complainant's property and property generally in Rutherford County, the record is filled with convincing testimony on this point, to which there has been no contradiction by the defendants-appellees, except in general terms. On Record (pp. 48-49) is a newspaper account published in Rutherford County carrying a financial statement of the County secured by the publisher of the paper from the County accountant before this litigation was thought of, which showed that the 1927 valuation was thirty-six million, but that the estimated actual valuation was sixty million. (R. p. 49). These same figures of an assessed valuation of thirty-six million but of an actual valuation of sixty million were set forth in a bond advertisement carrying a financial statement of the County prepared by Frank P. Stratford, County accountant, (R. pp. 52-53). Financial statements of the County to the same effect are found in the Record at pages 54, 55, 56, 77, 82, 83, 85 and 130, all of these financial statements being solemn declarations by the officials of

Rutherford County to the effect that property was assessed in Rutherford County at sixty per cent of its actual value. As the Record will show, a great many of these financial statements were embodied in the minutes of the Board of County Commissioners and typed into the records of the County as now shown, and this was done before there was any thought of litigation in this case. It is in the record (p. 56) that the County accountant, the chief financial officer of the County, wrote a letter approved by the County Attorney, Mr. N. C. Harris, whose name appears on the appellees' brief in this case, and said, among other things, the following:

> *"With reference to financial statement. You will note the assessed valuation is Thirty-six Million Dollars, whereas we have stated the estimated actual valuation Sixty Million Dollars. As I understand it, in North Carolina the assessed valuation is supposed to be One Hundred per cent, but we all know that it rarely is, and this estimated actual valuation is given you after consultation with persons who are in position to be fairly good judges. Frankly, our Commissioners are often too ready to please tax payers by listening to their arguments for low valuation."*

Not only do the solemn records of Rutherford County show that property was generally assessed at sixty per cent of its true value, but there are in the Record (pp. 89, 90 and 91) affidavits from citizens and business men of the defendant, Rutherford County, to the effect that property is generally assessed at sixty per cent of its true value.

When confronted with this evidence in the District Court, defendants attempted to explain it by saying that the tax exempt property in the County made up the difference between $36,000,000 and $60,000,000, referring to the large school houses and other public buildings in that County, but an examination of the financial statement of the County

(R. p. 55) and the evidence of witnesses (R. pp. 89, 90 and 91) show that the total value of tax exempt property did not exceed $3,530,000.

Against this conclusive proof of a general practice of assessing property at sixty per cent of its true value, the defendants-appellees were able to offer no evidence except statements containing generalizations made by County and tax officials of Rutherford County, and one weak affidavit signed by a few of the individual taxpayers, and even that affidavit does not deny that property is generally assessed at sixty per cent of its true value.

In addition to the above, there will be found in the Record (pp. 60 to 77) a list of transfers of land in Rutherford County showing the sale price and the 1927 assessed valuation, which speaks more convincingly than anything that could be said in affidavits to the effect that property in Rutherford County is assessed generally on a basis of even less than sixty per cent of the actual value. The defendants attempt to controvert the effect of that evidence by saying that the sale prices as specified in the deeds were boosted for trading purposes, but they do not place in the record a single instance of proof, and neither do they attempt to put into evidence anything to show that in those cases where no value is set forth in the deed, and which happened to be true in most cases, that the relation of the sale price to the assessed valuation was other than as was contended by complainant.

The strongest evidence that the defendants could offer in this case was a perferred stock circular published by other parties in 1921-22, in which the property of the complainant in North and South Carolina was placed at a figure considerably in excess of the assessed valuation but in this connection it must be borne in mind that the Company owned property in South Carolina about which the defendants did not trouble to inquire as to its valuation. Also it must be remembered that the preferred stock circular referred to was put out by people *who at that time owned control of the mill,*

and who were apparently more interested in selling stock than in operating the mill for its earning capacity, the same persons having sold their interests, (R. pp. 57-58) later to the present ownership of the mill at a figure that corresponds to the valuation placed on the property by the witness, Thomas Nelson, and the Company's appraisers.

The defendants also offered some evidence to the effect that some of the stock sold for $150 a share, whereas the majority sold for $100 a share, but the complainant showed that while it was true that a small amount of the stock did sell for $150, that stock was purchased by the present ownership of the mills in order to get rid of some minority stockholders who held sales contracts with the mills that were disadvantageous, and that this higher price paid for some of the stock was for the purpose of cancelling those contracts and not because the stock was worth the price paid therefor. (R. pp. 57-58). It is in evidence that no dividends have been paid on common stock since 1924, and none on preferred stock since 1926. (R. p. 57.) Then too, there has been several years depreciation and obsolescence since 1921-22.

CONCLUSION

The defendants-appellees attempt to defend their action by referring to the fact that the mill properties of the complainant-appellant have not been assessed on a higher basis than have other mill properties in Rutherford County. While denying that this is true, yet even if it were true, that would not constitute a justification for assessing complainant's property on a higher basis than property generally is assessed in Rutherford County, as there is no provision in the laws of the State of North Carolina allowing one class of property to be assessed at a higher proportionate valuation than other property in the County.

The complainant in this case contends that it has made out a prima facie case that entitles it to an interlocutory injunction pending a final hearing of the matter between the

parties, and that the District Court erred in refusing its application for an interlocutory injunction and erred in dismissing complainant's bill, and that the Circuit Court of Appeals erred in affirming the decision of the lower Court and thus denying to complainant the right to equitable relief in the Federal Courts, such relief in similar cases being available in the State Court. Complainant exhausted all administrative remedies and has paid that part of the tax which it is admitted is due.

Complainant respectfully submits that the Circuit Court of Appeals for the Fourth Circuit placed an improper construction on Section 267 of the Judicial Code and that the decision of that Court should be reversed to the end that complainant may have afforded to it equitable relief in the Federal Courts.

Respectfully submitted,

WILLIS SMITH,
Counsel for Complainant-Appellant.

W. T. JOYNER,
Of Counsel.

APPENDIX A

Chapter 71, Public Laws of North Carolina, 1927 Article II, Section 5, Sub-section 3:

To receive complaints as to property liable to taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, and to investigate the same, and to take such proceedings and to make such orders as will correct the irregularity complained of, if found to exist. The said board shall constitute a State board of equalization of valuation and taxes. In case it shall be made to appear to the board that any tax list in any county in the State is grossly irregular, unlawfully or unequally assessed, it shall be the duty of the board to correct such irregularities, and to equalize the valuations of property, in a particular county, upon complaint to it of particular taxpayers, or upon its own initiation, under rules and regulations prescribed by it, not inconsistent with this act. *Provided that no appeal shall be considered or values fixed, be changed unless notice of same is filed within ninety days after the final values are fixed and determined by the boards of commissioners of the county.*

APPENDIX B

Chapter 71, Public Laws of North Carolina 1927, Section 109:

The board of county commissioners of the several counties shall have and exercise authority to hear and determine specific complaints of overvaluation or undervaluation of any particular tract of real property, and after the general equalization order provided for in the preceding sections has been made, any person who owns property subject to taxation, and who finds that said property stands assessed for taxation, after such equalization order has been made, at an amount in excess of the actual value of such property on the first day of May, of the current year, may have the right to have the same reassessed and reappraised by the said board by filing with the clerk of the board of county commissioners *within twenty days* next after such equalization order has been made, an application in form and substance as follows:

(The form of application provided for was followed by complainant.)

APPENDIX C

The complainant's contention:

Personal property valuation as returned on tax list (not disputed)	$ 513,584.00
Real estate valuation as returned by Henrietta Mills on tax return	1,373,768.00
Total actual value of real and personal property as returned by Henrietta Mills	$1,887,352.00
Sixty per cent of actual valuation for tax purposes to conform to rule of valuation in Rutherford County	1,132,411.20

* * * * * * *

The defendants' contention:

Valuation of personal property accepted by County Board (not in dispute)	$ 513,584.00
Valuation of real property as assessed by County Board (in dispute)	2,124,235.00
Original valuation by County Board of real and personal property	$2,637,819.00
Reduced by State Board of Assessment	275,000.00
Valuation real and personal property as set up on tax books	$2,362,819.00